BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DON J. SPEER	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,025,237
UNITED PARCEL SERVICE, INC.	)	
Respondent	)	
AND	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Claimant appeals the May 3, 2006 Award of Administrative Law Judge Kenneth J. Hursh. Claimant was denied benefits after the Administrative Law Judge (ALJ) found claimant had failed to prove that he suffered accidental injury arising out of and in the course of his employment with respondent. The Appeals Board (Board) heard oral argument on July 11, 2006.

APPEARANCES

Claimant appeared by his attorney, Gary L. Jordan of Ottawa, Kansas. Respondent and its insurance carrier appeared by their attorney, Stephanie Warmund of Kansas City, Missouri.

RECORD AND STIPULATIONS

The Board has considered the record and adopts the stipulations contained in the Award of the Administrative Law Judge. Additionally, at oral argument to the Board, the parties agreed that claimant's request for reimbursement for medical mileage expenses in the amount of $36.82 (for his travel to Danny M. Gurba, M.D.'s office and to Brian C. Kindred, M.D.'s office) and his request for unauthorized medical expenses in the amount of $144.34 (for the treatment with Dr. Kindred) hinge upon the Board's decision with regard to whether claimant suffered accidental injury arising out of and in the course of his employment with respondent. If the Board finds this claim is compensable, then the above amounts will be awarded to claimant pursuant to the parties' stipulations. Additionally, the parties stipulated that a 10 percent permanent partial disability to the body is appropriate if the Board finds this matter compensable.

ISSUES

Did claimant suffer accidental injury arising out of and in the course of his employment with respondent?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary record herein, the Board finds the Award of the Administrative Law Judge should be reversed, and claimant should be awarded a 10 percent permanent partial disability to the body for the injuries suffered while employed with respondent. Additionally, claimant will be awarded medical mileage and unauthorized medical reimbursement, as above stipulated.

Claimant, a 28½-year employee of respondent, worked as a package car driver. For the last 24½ years, claimant picked up a loaded truck and delivered his packages to their destinations. This required that claimant lift up to 150 pounds on a daily basis. The job also required claimant enter and exit his truck 150 to 160 times per day. The truck claimant drove had a 22-inch step up into the cab. It also required that claimant pivot around the gear box into the back of the truck. Claimant also had to deliver the packages, which created added walking and occasional stair climbing.

Approximately 2½ years before the date of the regular hearing, claimant was presented with a Circle of Honor Award for 25 years safe driving without an accident. Mark Bolig, claimant's supervisor, congratulated claimant on completing 1.4 million stops in the course of his employment, accident free.

In approximately 1996, claimant began experiencing pain in his low back and right hip. He received occasional adjustments from his local chiropractor in Ottawa, John M. Brockway, D.C. In 2004, claimant advised respondent of the problems and was sent to Dr. Fevurly, who returned claimant to full duty after prescribing medication.

Claimant was treated by Dr. Brockway from March 3, 2003, through April 4, 2005. At the time of Dr. Brockway's last examination, claimant continued to experience right hip and thigh pain. After Dr. Brockway's treatments proved ineffective, claimant was referred to Dr. Kindred, who ordered x-rays of his low back and right hip. After his examination by Dr. Kindred, claimant returned to respondent, again requesting medical treatment. Claimant was then sent to Dr. Gurba, who performed added x-rays. Claimant was once again returned to his regular job. However, claimant testified that his condition continued to worsen.

Dr. Gurba examined claimant on August 18, 2005. Claimant presented with right hip pain. The pain was caused by claimant's daily work activities. X-rays showed advanced osteoarthritis in the right hip. Claimant's hip was bone-on-bone, with bone

spurs. Dr. Gurba testified that this may be a congenital condition from claimant's early teen years. He opined that claimant's condition was multi-factorial, being caused by age, deformity, wear and tear, work and daily activities. In his opinion, the underlying problem was caused by all the above. He did agree that the repetitive nature of claimant's work aggravated the condition and made it symptomatic earlier than if claimant had worked at a sedentary job. He also stated that claimant's daily activities aggravated the condition.

Claimant was referred by his attorney to board certified orthopedic surgeon Edward J. Prostic, M.D., for an examination on October 14, 2005. Dr. Prostic agreed with the diagnosis of osteoarthritis of the right hip. He opined the condition was aggravated by the repetitious climbing and heavy lifting at work.

Respondent argues that claimant's condition was caused by claimant's outside activities, including horseback riding and riding a WaveRunner. However, Dr. Prostic testified that he has not seen a patient in whom he thought osteoarthritis was caused or contributed to by horseback riding or riding a WaveRunner. Even if it did, he stated it would be only a temporary aggravation.

In workers compensation litigation, it is the claimant's burden to prove his entitlement to benefits by a preponderance of the credible evidence.[1]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[2]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[3]

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

> . . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or

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[1] K.S.A. 44-501 and K.S.A. 2004 Supp. 44-508(g).

[2] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[3] K.S.A. 44-501(a).

> origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."[4]

It is well established under the Workers Compensation Act in Kansas that when a worker's job duties aggravate or accelerate an existing condition or disease, or intensify a preexisting condition, the aggravation becomes compensable as a work-related accident.[5]

The Kansas legislature has clearly expressed an intent to liberally construe the Act for the purpose of bringing employers and employees within the provisions of the Act to provide the protections of the Workers Compensation Act to both.[6]

The Board acknowledges that K.S.A. 2004 Supp. 44-508(e), in defining personal injury, specifically excludes disabilities suffered as a result of the natural aging process or by the normal activities of day-to-day living. However, the Board does not find entering and exiting a delivery truck 150 to 160 times in a work day to be a normal activity of day-to-day living. As noted by both Dr. Gurba and Dr. Prostic, claimant's work activities aggravated and accelerated claimant's hip condition.

The Board finds that claimant's job duties with respondent did aggravate his osteoarthritis condition in his right hip. Therefore, the ALJ's determination to the contrary is reversed. As stipulated above, claimant is entitled to a 10 percent permanent partial disability to the whole body for the injuries suffered during his employment with respondent.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Kenneth J. Hursh dated May 3, 2006, should be, and is hereby, reversed, and an award of compensation is hereby made in favor of claimant and against the respondent, United Parcel Service, Inc., and its insurance carrier, Liberty Mutual Insurance Company, for an accidental injury which occurred through a series of micro-traumas through April 1, 2005, and based upon an average weekly wage of $1,159.06, for 41.50 weeks permanent partial disability compensation at the rate of $449.00 per week or $18,633.50 for a 10 percent permanent partial general disability.

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[4] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

[5] *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978).

[6] K.S.A. 44-501(g).

As of the date of this award, the entire amount is due and owing and ordered paid in one lump sum less any amounts previously paid.

Claimant is ordered reimbursed the sum of $36.82 for mileage to and from the medical examinations with Dr. Gurba and Dr. Kindred.

Claimant is further ordered reimbursed the sum of $144.34 in unauthorized medical expenses for the treatment provided by Dr. Kindred.

With regard to the fees ordered paid by the respondent, the Award of the ALJ is affirmed.

IT IS SO ORDERED.

Dated this ____ day of August, 2006.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Gary L. Jordan, Attorney for Claimant
Stephanie Warmund, Attorney for Respondent and its Insurance Carrier